IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
April 20, 2000 Session

STATE EX REL. JAMES G.(JERRY) WOODALL v. D & L CO., INC., ET AL.

An Appeal from the Chancery Court for Madison County
No. 54682 Charles O. McPherson, Special Chancellor

No. W1999-00925-COA-R3-CV - Filed May 16, 2001

This is a public nuisance case. The State filed a petition for abatement of a public nuisance against the defendants, the owners and operators of an adult entertainment club. The trial court found that the club constituted a "nuisance" under Tennessee Code Annotated § 29-3-101(a)(2), enjoined the defendants from operating a business on the premises, and entered an order allowing the forfeiture of the defendants' fixtures and property on the premises. The defendants appeal. We affirm in part, reverse in part, and modify. We hold that Tennessee Code Annotated § 29-3-101(a)(2) is not unconstitutionally vague, and affirm the finding that the defendants' place of business constituted a public nuisance. We reverse in part because the trial court's injunctive order goes beyond that which is allowable under the nuisance statute.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part; Reversed in Part; and Modified

HOLLY KIRBY LILLARD, J., delivered the opinion of the court, in which ALAN E. HIGHERS, J., and DAVID R. FARMER, J., joined.

Frierson M. Graves, Jr. and Michael F. Pleasants, Memphis, Tennessee, for the appellants, D & L Co., Inc., Billy Diamond, Scott Luckman, James Jansen, John McKnight, Planet Rock, Inc., and SBR Enterprises, Inc.

Paul G. Summers, Attorney General and Reporter, Michael E. Moore, Solicitor General, and Steven A. Hart, Nashville, Tennessee, for the appellee, State of Tennessee.

OPINION

This is a public nuisance case against an adult entertainment club. On May 1, 1998, James G. Woodall, District Attorney General for the 26th Judicial District, acting on behalf of the State of Tennessee, filed a Petition for Abatement of Public Nuisance against Defendants/Appellants D & L Company, Inc. ("D&L"), Billy Diamond, Scott Luckman, and James Jansen. D & L was the owner of Oasis Presents Platinum Plus ("Oasis club"), an adult entertainment club located at 702 Old

Hickory Boulevard in Jackson, Tennessee. Diamond, Luckman, and Jansen were business partners who owned the property on which the club was situated. The State later moved to add Planet Rock, Inc., SBR Enterprises, Inc., and John McKnight as defendants. The record does not clearly indicate how SBR Enterprises and John McKnight are related to the original defendants. The record shows that the name of the club at 702 Old Hickory Boulevard was first "The Oasis," then "Planet Rock," and then finally, at the time the petition was filed, "Oasis Presents Platinum Plus." These parties will be referred to collectively as "Defendants."

The petition was filed pursuant to Tennessee Code Annotated §§ 29-3-101 to 29-3-115 (2000) ("nuisance statute"). The petition alleged that the Defendants:

> . . . maintained a place wherein there has been the unlawful sale in intoxicating liquors, drinking, quarreling, fighting, and breaches of the peace have taken place and where controlled substances have been found and to which the Jackson Police Department has received numerous calls to said location resulting in several reports of such conduct being made.

The petition asked that the trial court declare the Oasis club a public nuisance,[1] order that the club be boarded and padlocked, and order that all the fixtures, equipment, currency, and property used in the club be subjected to forfeiture as allowed by the nuisance statute. The petition also sought a permanent injunction prohibiting the Defendants from permitting the property to be operated as a public nuisance in the future.

Along with its petition, the State filed seven affidavits signed by Jackson City Police officers or investigators who had witnessed events at the Oasis club. The affidavits stated that, from January 1, 1994, until April 1, 1998, there were 147 incidents in which police were called to the Oasis club, resulting in 75 arrests. The affidavits asserted that the police spent "an inordinate amount of time and resources dealing with situations that arise at 702 Old Hickory Boulevard."

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[1]Tennessee Code Annotated § 29-3-101(a)(2) defines "nuisance" as:

> . . . any place in or upon which lewdness, assignation, prostitution, unlawful sale of intoxicating liquors, unlawful sale of any regulated legend drug, narcotic or other controlled substance, unlawful gambling, any sale, exhibition or possession of any material determined to be obscene or pornographic with intent to exhibit, sell, deliver or distribute matter or materials in violation of §§ 39-17-901-- 39-17-908, § 39-17-911, § 39-17-914, § 39-17-918, or §§ 39-17-1003-- 39-17-1005, quarreling, drunkenness, fighting or breaches of the peace are carried on or permitted, and personal property, contents, furniture, fixtures, equipment and stock used in or in connection with the conducting and maintaining any such place for any such purpose . . .

Tenn. Code Ann. § 29-3-101(a)(2) (2000).

Several of the affidavits discussed in detail some of the incidents at or near the Oasis club. Jackson Police Investigator Doris Johnson reported in her affidavit an incident occurring on March 5, 1998, in which a female dancer at the club claimed that she had been raped by a male patron while performing a "lap dance" for him. Jackson Police Officer Randy Ryan related in his affidavit eleven incidents in which he had arrested individuals outside the Oasis club, usually in the parking lot, for various crimes including public drunkenness, underage drinking, DUI, and possession of controlled substances. Police Officer Mike Landreth discussed in his affidavit twelve incidents in or about the club in which he had made arrests for those crimes, as well as for vehicular burglary and vandalism, a bomb threat, and aggravated assault. Some of the assault arrests involved club employees.

The affidavit of Jackson Police Officer Randy Urig also discussed several incidents in which he had answered calls at the Oasis club and made arrests. He described one incident that resulted in the death of a club patron:

> On September 19, 1995, I responded to [Oasis] in reference to a fight. I along with several other officers, were met at the door by the manager who told us that he had a man in his office that had been involved in a fight, that he was unconscious, and that he could not be awakened. I went to the office and located the victim sitting in a chair behind a desk with small abrasions on his head and face. He was not moving and did not appear to be breathing. He had no vital signs. EMS was called. They arrived and began CPR, then transported the victim to the hospital.
>
> We began to speak with witnesses who stated that a disagreement over a white female began between [a] white male and the victim in [Oasis]. Once outside the witnesses stated that the victim and the white male began fighting with the victim being pinned to the ground by the white male. The white male continued to punch the victim while the female kicked him in the head. The fight stopped and the victim attempted to get up but the white male kicked him twice in the head with his boots knocking the victim unconscious. The white male and female left the scene. The victim never regained consciousness and ultimately died from his injuries. The white male and female were arrested and charged with second-degree murder.

In another affidavit, Police Officer Randy Blankenship recounted several incidents in which he had been called to the club and made arrests, including an incident in which a manager of the club claimed that he had been assaulted by one of his employees, a male bouncer, after the manager accused him of letting a female patron enter the club for free. Another police officer, Robert Beilke, testified in his affidavit about an incident in which three members of the visiting Double A Jacksonville Suns baseball team claimed that they were assaulted by bouncers at the club. Officer Beilke's affidavit stated that the baseball players had been drinking but were not intoxicated. They said that they asked the waitress for water, and were told that water was $1.00 per glass. When they asked why they would be charged for water, the waitress called over three bouncers who assaulted them by punching them and physically throwing them out of the club. Officer Beilke said that one player's nose may have been broken.

The affidavit of Police Officer Alan Randolph related his observations inside the club while there as an undercover officer. Officer Randolph described the activities of the club's nude dancers and other employees while the club sold alcoholic beverages, in contravention of a Jackson city ordinance which prohibits nudity and sexually explicit conduct at an establishment that sells alcohol.[2] On February 27, 1998, Randolph testified, he entered the club in plain clothes

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[2]The Jackson City Ordinance provides:

It shall be unlawful for any person to engage in any of the following activities in any establishment dealing in alcoholic beverages or:

(1) No person shall expose to public view his or her genitals, pubic areas, vulva, anus, anal cleft or cleavage or buttocks or any simulation thereof in an establishment dealing in alcoholic beverages or beer.

(2) No female person shall expose to public view any portion of her breast below the top of the areola or any simulation thereof in an establishment dealing in alcoholic beverages or beer.

(3) No person maintaining, owning, operating an establishment dealing in alcoholic beverages shall suffer or permit any person to expose to public view his or her genitals, pubic area, vulva, anus, anal cleft or cleavage or buttocks or simulation thereof within the establishment dealing in alcoholic beverages or beer.

(4) No person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any female person to expose to public view any portion of her breast below the top of the areola or any simulation thereof in an establishment dealing in alcoholic beverages or beer.

(5) No person shall engage in and no person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any sexual intercourse, masturbation, sodomy, beastiality, oral copulation, flagellation, any sexual act which is prohibited by law, touching, caressing or fondling of the breasts, buttocks, anus or genitals or the simulation thereof within an establishment dealing in alcoholic beverages or beer.

(6) No person shall cause and no person maintaining, owning or operating an establishment dealing in alcoholic beverages shall suffer or permit the exposition of any graphic representation, including pictures or the projection of film,

(continued...)

and immediately noticed aluminum beer kegs. A waitress then asked him if he wanted a beer. Randolph noted that the female dancers on the main stage exposed their naked breasts, and that several removed their bottoms and exposed their sexual organs "in great detail." He observed that many patrons physically touched the dancers' breasts and that dancers would perform "lap dances" in which they simulated sexual contact with patrons. He observed a waitress make sexual contact with one of the dancers. The waitress later brought Randolph a beer, which he removed from the premises to be tested. Testing confirmed that it was beer. Randolph also testified in his affidavit about two subsequent visits to the Oasis club, on March 4 and March 6, 1998, when he observed similar events. During these visits, Randolph wore a concealed audio/visual device and recordings from the device were entered into evidence.

After the petition and the affidavits were filed, the Chancery Court for Madison County, Chancellor Joe C. Morris, entered a temporary injunction pursuant to Section 29-3-105, closing the Oasis club and prohibiting the Defendants from entering the premises. Pursuant to Section 29-3-101(c), the Jackson Police searched the premises and seized the personal property located there.

On May 15, 1998, the Defendants filed a motion to dismiss the nuisance petition and to dissolve the temporary injunction. On June 3, 1998, in a hearing before Chancellor Morris, two witnesses testified on behalf of the State about police calls to the Oasis club. According to their testimony, from January 1, 1994 to April 24, 1998, there were approximately 175 incident reports in which police had been called to the Oasis club. Since the parking lot at the Oasis club is quite small, many patrons of the club parked their cars at the adjacent K-Mart parking lot. A police officer testified about several incidents in which patrons of the club had been arrested for underage drinking, DUI, and possession of marijuana, both in the Oasis club's parking lot and in the adjacent K-Mart parking lot.

After this testimony, the parties agreed to meet privately to attempt to stipulate as to the factual evidence to be presented. The parties had previously made other stipulations, such as the fact that the Defendants had a valid license to sell beer at the Oasis club. Subsequently, a special judge, Honorable Charles O. McPherson, was designated as Special Chancellor in this case. Judge McPherson heard testimony and arguments on July 20, 1998.

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[2](...continued)

> which depicts human genitals, pubic area, vulva, anus, anal cleft or cleavage, buttocks, female breasts below the top of the areola, sexual intercourse, masturbation, sodomy, beastiality, oral copulation, flagellation, any sexual act prohibited by law, touching, caressing or fondling of the breasts, buttocks, anus, or genitals, or any simulation thereof with any establishment dealing in alcoholic beverages or beer.

Ordinances of Jackson, Tennessee, Ch. 3, § 8-301.

At the July 20 hearing, the parties notified the trial court that they were unable to stipulate as to the factual evidence to be presented, and the trial court heard testimony. Dennis Mays, Commander of the Uniform Patrol Division of the Jackson Police force, testified that the City issued citations against the Oasis club in 1996 for permitting nude dancing where alcohol was sold in violation of the Jackson city ordinance. Commander Mays testified that the Defendants initially challenged the citations, arguing that the city ordinance was unconstitutional, but later dismissed that challenge. For a brief period after the citations were issued, no alcohol was sold on the premises. However, Commander Mays soon began to receive reports of arrests outside the club for driving while intoxicated. After interviewing Trey Keller, a former employee of the club, in January 1998, Commander Mays suspected alcohol was being served on the premises. In February 1998, Commander Mays enlisted undercover officers to observe events inside the club.

Trey Keller, the former club employee interviewed by Commander Mays, testified at the July 20 hearing, in exchange for immunity from criminal prosecution. Keller worked at the Oasis club from April or May 1996 until October 1997. He was hired as a security worker, or "bouncer," and became the day manager of the Oasis club in April 1997. As day manager, Keller's responsibilities included ordering beer, according to the instructions of the general manager, Michael Johnson. At first, the beer was stored in a cooler in a gas station next door, but Billy Diamond, one of the club's owners, arranged to have a cooler installed on the premises. After the cooler was installed, Keller stated, Diamond ordered the beer himself. When asked why the club sold beer, Keller responded:

> When the customers would consume the beer they would get intoxicated and become more free with their money. They would spend more money on more beer. They would spend more money on the girls, and that, in turn, translated [into] greater profits for the club.

Keller testified that he saw cocaine, crystal meth, uppers, downers, marijuana, and alcohol in the possession of many dancers, bouncers, and managers, and that he had also possessed and used those drugs. Keller observed bouncers giving controlled substances to dancers in return for sexual favors, and Keller had also done so himself. Keller said that he had observed other bouncers confiscate controlled substances from patrons of the club, eject the patrons from the club, and keep the substances for their own personal use. He said that when a patron was acting belligerently or had to be ejected from the club, a fight or altercation often broke out, and that these altercations sometimes went beyond merely subduing the unruly patron. He observed a bouncer and a DJ kick an unconscious man in the head, and on another occasion, he observed a bouncer pin a patron against a wall and repeatedly punch him in the face, even though the patron "had no fight left in him" and "did not want to do anything but leave and go home." Keller estimated that, on a typical night, the club would eject one or two patrons, and, on average, three "really good" fights would occur each week.

Keller testified about an incident which resulted in him being arrested and charged for robbery and aggravated assault. He testified that he came upon a club patron in the club parking lot cutting the tires on a car belonging to one of the club's bartenders. Keller chased the man, caught

him after he ran into a dumpster, got his wallet and called the police. The patron then told the police that Keller beat him up and took his wallet. Keller testified about another incident in which a patron refused to pay for a lap dance and was beaten by several bouncers and ejected from the club. The patron then drove his van into the front of the club.

Keller testified that the club's management and owners knew about the Jackson city ordinance prohibiting nude dancing where alcohol is sold, but chose to ignore the law. Keller testified that he voluntarily left his job at the Oasis club after a Christian friend witnessed to him.

A dancer who had danced at the Oasis club in July and August 1996, Julia Hernandez, testified at the July 20 hearing. Hernandez testified that, at first, she danced during the daytime. She testified that it was her understanding that the dancers did not remove their clothing during the day because that was when the club sold alcohol. She understood that, at 6:00 PM, the club would stop selling alcohol and the dancers would perform totally nude. She testified that she observed the day manager of the club using marijuana. She testified that she danced at the club on two nights, one night with a sixteen year old girl who was her boyfriend's sister and her son's girlfriend. She did not tell the club manager the girl's age.

Jackson Police Officer Alan Randolph testified that he entered the club in an undercover capacity on eleven different occasions from February until March 1998. On four of those occasions, Officer Randolph used a video device hidden in a "fanny pack" to tape record the events inside the club. Officer Randolph testified that on all of the occasions, he observed women dancing topless and fully nude, and alcohol being sold. Partially on the basis of Officer Randolph's testimony, the parties stipulated to the fact that, at times, dancers performed nude while alcohol was sold. At the July 20 hearing, the Defendants cross-examined witnesses and asserted that many of the police reports with the location address listed as 702 Old Hickory Boulevard involved events which occurred on the road in front of the club or in the K-Mart parking lot next door, and did not actually occur at the club. However, the Defendants presented no proof at the July 20 hearing.

On November 25, 1998, the trial judge entered a detailed memorandum opinion and order, denying the Defendants' motions to dismiss the petition and dissolve the temporary injunction, and granting the State's petition in full. The trial judge concluded that the Jackson city ordinance was not unconstitutional. He reasoned that the United States Supreme Court has held that a city ordinance regulating the sale of alcohol where nude dancing occurs should be subject to intermediate scrutiny because, although the ordinance restricts expressive activity, it also falls within the inherent police power of every state to regulate the sale of alcoholic beverages. The trial judge also concluded that the terms "fighting, quarreling, drunkenness, and breaches of the peace," as used in the nuisance statute, were not unconstitutionally vague or indefinite, stating simply that the court "must conclude that a person of common intelligence does not have to guess what is meant by each of the terms set forth in the nuisance statute." The trial judge found that there were 158 incident reports in which the police made calls to the Oasis club, resulting in 102 arrests. The trial judge concluded that the Defendants had conducted their business on 702 Old Hickory Boulevard in a manner that constituted a nuisance as defined in the nuisance statute. The temporary injunction was

made permanent and the Defendants were prohibited from re-entering the premises. The order provided:

> The Respondents are permanently enjoined from engaging in conduct resulting in a continuous public nuisance at 702 Old Hickory Boulevard, Jackson, Madison County, Tennessee or permitting nude dancing where alcoholic beverages are sold in violation of §8-301 of the Ordinances of the City of Jackson, Tennessee. Further, Respondents are permanently enjoined from operating a business at this location because of Respondents[']continued flagrant violation of the law and because of the continuous quarreling, drunkenness, and breaches of the peace occurring, directly or indirectly by themselves, their agents or representatives.

The trial judge also found that the forfeiture of the fixtures and property located on the premises under the nuisance statute was valid, and ordered the property forfeited to the State. From this order, the Defendants now appeal.[3]

On appeal, Defendants raise eight issues. They argue that the sale of alcoholic beverages where nude dancing occurs, though in violation of the Jackson city ordinance, does not constitute an "unlawful sale of intoxicating liquors" under the nuisance statute. ***See*** Tenn. Code Ann. § 29-3-101(a)(2). Second, Defendants argue that the Jackson city authorities are using the nuisance statute as a pretext to stop nude dancing, which is protected by the First Amendment. Third, they argue that the Jackson city ordinance prohibiting nude dancing and sexually explicit conduct where alcohol is sold is overbroad and unconstitutional. Fourth, Defendants argue that the definition of "nuisance" in Tennessee Code Annotated § 29-3-101(a)(2) is unconstitutionally vague and indefinite because it does not specify how many incidents of "quarreling, drunkenness, fighting, or breaches of the peace" must be present in order to constitute a nuisance. Fifth, Defendants argue that even if the definition of "nuisance" is constitutionally adequate, the events at the Oasis club did not constitute a nuisance. Sixth, Defendants argue that the temporary injunction provisions of the nuisance statute violate due process when applied to First Amendment activities because they constitute a prior restraint on expressive activity and lack the necessary procedural safeguards to ensure against abuse by law enforcement officials. Seventh, Defendants argue that even if their operation did constitute a nuisance under the statute, the permanent injunction is too broad, and that they should be able to maintain another lawful business on the premises, including one that has nude dancing protected by the First Amendment. Lastly, Defendants argue that the forfeiture of their property was in error because there was no nuisance under the law, or alternatively that the forfeiture should only apply to property used in creating the nuisance.

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[3]Following the trial court's decision, the Defendants moved for a stay of the judgment pending this appeal, which the trial court granted in part and denied in part. The trial court denied the Defendants' motion to stay the enforcement of the permanent injunction, but granted the Defendants' request to stay the forfeiture of their property, on the condition that they post a $25,000 bond insuring against any loss or damage to the property.

In an appeal from a bench trial, we review the case ***de novo*** with a presumption of correctness of the findings of fact by the trial court. ***See*** Tenn.R.App.P. 13(d). There is no presumption of correctness applied to the trial court's decisions on questions of law. ***See Ridings v. Ralph M. Parsons Co.***, 914 S.W.2d 79, 80 (Tenn. 1996).

Tennessee Code Annotated § 29-3-101(a)(2) defines "nuisance" as "any place in or upon which lewdness, assignation, prostitution, unlawful sale of intoxicating liquors . . . quarreling, drunkenness, fighting ***or*** breaches of the peace are carried on or permitted. . . ." (emphasis added). Here, the permanent injunction and the finding that the Oasis club constituted a public nuisance was based on two separate grounds: (1) the Defendants engaged in the "unlawful sale of intoxicating liquors" by allowing nude dancing to occur in their establishment, in violation of the Jackson city ordinance prohibiting nude dancing and sexually explicit conduct in places where alcohol is sold; and (2) numerous incidents of fighting, public drunkenness, and other breaches of the peace occurred at the Defendants' place of business. Either of these reasons is an independently sufficient basis to declare the Oasis club a public nuisance under the nuisance statute.

We will first address whether the Defendants' place of business constituted a public nuisance because of "quarreling, drunkenness, fighting, or breaches of the peace." The Defendants contend that the definition of "nuisance" in this regard is unconstitutional because it is vague and indefinite.

In ***Davis-Kidd Booksellers, Inc. v. McWherter***, 866 S.W.2d 520, 531 (Tenn. 1993), the defendant bookstores argued that a statute applicable to the display of books and similar materials was unconstitutionally vague. The statute was a criminal statute that regulated the display of materials "harmful to minors," including materials which were obscene or which depicted "excess violence." ***See Davis-Kidd***, 866 S.W.2d at 522. The Tennessee Supreme Court affirmed the trial court's holding that the term "excess violence" appearing in the statute was unconstitutional because it was vague and indefinite. ***See id.*** at 532.

In analyzing the statute, the Court in ***Davis-Kidd*** first noted that "it is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." ***Davis-Kidd***, 866 S.W.2d at 531, quoting ***Grayned v. City of Rockford***, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972). Quoting at length from ***Grayned***, the Court in ***Davis-Kidd*** discussed the dangers of an unconstitutionally vague law:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s]

> upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.

Davis-Kidd, 866 S.W.2d at 531 (quoting ***Grayned***, 408 U.S. at 108-109, 92 S.Ct. at 2298). Since the statute at issue in ***Davis-Kidd*** was a criminal statute, the Court noted that such a statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." ***Davis-Kidd***, 866 S.W.2d at 532 (quoting ***Kolender v. Lawson***, 461 U.S. 352, 358, 103 S.Ct. 1855, 1858, 75 L.Ed. 2d 903 (1983)). The Court concluded that the definition of the term "excess violence" made the decision of what constitutes "excess violence" entirely subjective and gave little or no guidance to officials charged with enforcement of the statute. ***Davis-Kidd***, 866 S.W.2d at 532. Consequently, it found the statute to be unconstitutionally vague. ***Id.***

While the requirements of due process are substantial, the Constitution does not require that a statute define its terms with exact precision. ***See Broadrick v. Oklahoma***, 413 U.S. 601, 608, 93 S.Ct. 2908, 2913, 37 L.Ed.2d 830 (1973). For statutes that impose only civil penalties, as in this case, the vagueness doctrine requires less precision than is required for statutes which impose criminal penalties, because their consequences are typically less severe. ***See Gresham v. Peterson***, 225 F.3d 899, 908 (7th Cir. 2000). A statute is not unconstitutionally vague merely because it calls upon the trier of fact to apply his or her own reasonable judgment. ***See United States v. Ragen***, 314 U.S. 513, 523, 62 S.Ct. 374, 378, 86 L.Ed. 383 (1942). Words appearing in a statute should be given their natural and ordinary meaning. ***See Boles v. City of Chattanooga***, 892 S.W.2d 416, 420 (Tenn. Ct. App. 1994).

The Defendants argue that the statute does not properly define how many incidents of quarreling, drunkenness, fighting, or breaches of the peace constitute a nuisance, leaving them unable to conform their conduct to the statute. The pertinent portion of the statutory definition of "nuisance" is:

> . . . any place in or upon which lewdness, assignation, prostitution, unlawful sale of intoxicating liquors, unlawful sale of any regulated legend drug, narcotic or other controlled substance, . . . quarreling, drunkenness, fighting or breaches of the peace are carried on or permitted. . . .

Tenn. Code Ann. § 29-3-101(a)(2) (2000). The statute is clearly a civil statute, not a criminal statute.[4] ***See*** Tenn. Code Ann. § 29-3-110 (2000) (providing for an order of abatement for a public nuisance).

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[4]The Defendants argue that the nuisance statute should be analyzed as a criminal statute because, under Tennessee Code Annotated § 29-3-111, it is a misdemeanor for a person to enter a building which has been closed under a preliminary injunction pursuant to the nuisance statute. This argument is without merit.

The statute in this case cannot be characterized as precise; the definition of "nuisance" is "marked by 'flexibility and reasonable breadth, rather than meticulous specificity.' " ***Grayned***, 408 U.S. at 110, 92 S.Ct. at 2300 (quoting ***Estaben v. Central Missouri State College***, 415 F.2d 1077, 1088 (8th Cir. 1969)). While the statute may require the exercise of reasonable judgment, as a civil statute, we conclude that it is not so vague that the decision of what constitutes a nuisance is "entirely subjective." ***See Davis-Kidd***, 866 S.W.2d at 532. As noted in ***Grayned***, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." ***Grayned***, 408 U.S. at 110, 92 S.Ct. at 2300. In this context, "we think it is clear what the [statute] as a whole prohibits." ***Id.*** Consequently, we find that the statutory definition of "nuisance" is not unconstitutionally vague as it relates to "any place in or upon which . . . unlawful sale of any regulated legend drug, narcotic or other controlled substance, . . . quarreling, drunkenness, fighting or breaches of the peace are carried on or permitted. . . ." Tenn. Code Ann. § 29-3-101(a)(2) (2000).

In the alternative, the Defendants contend that even if the definition of "nuisance" is sufficiently definite to satisfy due process, the evidence presented to the trial court regarding the events at the Oasis club cannot, as a matter of law, constitute a nuisance. In its Memorandum Opinion, the trial court found that, during the approximately four-year period, there were 158 incident reports in which police were called to the Oasis club or its vicinity, and that 102 arrests resulted.[5] The Defendants contend that many of the incident reports offered by the State were driving violations that occurred on the street in front of the Oasis club, or were incidents that occurred in the K-Mart parking lot next door. In our review of the record, we found a few police reports involving events that do not appear to involve the Oasis club. However, the overwhelming majority of the reports clearly involve the club. The Defendants presented no testimony refuting Keller's testimony that bouncers at the club ejected, on average, two to three patrons each night, and that the bouncers would frequently go "beyond merely subduing" unruly patrons. There was no evidence refuting Keller's assertion that there were about three "really good" fights each week, and that the club's owners simply "ignored" the Jackson city ordinance prohibiting nude dancing where alcoholic beverages are sold. There was no evidence to refute the testimony that illegal drugs were widely used by employees and patrons alike. Clearly, violence and other illegal activities were commonplace; the Oasis club was a place in which "quarreling, drunkenness, fighting or breaches of the peace [were] carried on or permitted." Tenn. Code Ann. § 29-3-101(a)(2) (2000).

The Defendants argue that the State is using the nuisance statute in this case as a pretext to stop nude dancing, which is an activity protected by the First Amendment. Therefore, Defendants contend, the nuisance statute should be reviewed using the level of scrutiny applicable to a statute which impinges on First Amendment freedoms. However, the record does not support the Defendants' assertion that the nuisance statute is being utilized in this case to stop nude dancing. Some of the evidence described incidents involving nudity and sexually explicit conduct at the Oasis club while alcohol was being sold. However, there was abundant evidence of frequent violence, vandalism, drunkenness and illegal drug use. These activities are unlawful under the statute

[5]This tends to indicate that any indefiniteness in the statutory definition of "nuisance" did not cause the Defendants to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden zone were clearly marked." ***Grayned***, 408 U.S. at 109-109, 92 S.Ct. at 2299.

irrespective of whether they occur at a club at which nude dancing is performed. Regardless of whether nude dancing is protected by the First Amendment, the Defendants cannot receive a special exemption from generally applicable laws simply because First Amendment activities take place on their premises. ***See Arcara v. Cloud Books, Inc.***, 478 U.S. 697, 705, 106 S.Ct. 3172, 3176, 92 L.Ed.2d 568 (1986). When a nuisance statute is directed toward clearly unlawful activities in a place where First Amendment activities are occurring, there is no need to apply First Amendment scrutiny because citizens are free to exercise their First Amendment rights elsewhere. ***See id.*** Even if evidence involving nudity and sexually explicit conduct is not considered, the evidence is clearly sufficient to support a finding that the club was a public nuisance. Therefore, the Defendants' argument that the State is using the nuisance statute as a pretext is without merit.

Defendants next raise a constitutional issue regarding the temporary injunction provisions of the nuisance statute. They argue that the temporary injunction provisions of the nuisance statute lack the necessary procedural safeguards to ensure a prompt judicial determination of whether a public nuisance exists, and thus constitute a prior restraint upon First Amendment activity. Again, the evidence was clearly sufficient to support a finding of public nuisance and an order of temporary injunctive relief, even if evidence involving nude dancing and sexually explicit conduct is not considered. This argument is also without merit.

Accordingly, we find that the provisions of Tennessee Code Annotated § 29-3-101(a)(2) which define "nuisance" as a place in which "unlawful sale of any regulated legend drug, narcotic or other controlled substance, . . . quarreling, drunkenness, fighting or breaches of the peace are carried on or permitted" is not unconstitutionally vague, and that the evidence supports the trial court's conclusion that the Oasis club was public nuisance on this basis. This holding makes it unnecessary to address the issues raised by the Defendants regarding the trial court's holding that the Oasis club was a public nuisance because the club engaged in the "unlawful sale of intoxicating liquors" by allowing nude dancing and sexually explicit conduct at a place in which alcohol was served, in violation of the Jackson city ordinance.

Defendants also contend that the permanent injunction granted by the trial court is too broad. Section 29-3-110 states that, upon a finding that a place is a public nuisance, the trial court shall "perpetually enjoin the defendant from engaging in, conducting, continuing, or maintaining such nuisance, directly or indirectly . . . and perpetually [forbid] the owner of the building from permitting or suffering the same to be done in such building." ***See*** Tenn. Code Ann. § 29-3-110. The trial court's order in this case states:

> The Respondents are permanently enjoined from engaging in conduct resulting in a continuous public nuisance at 702 Old Hickory Boulevard, Jackson, Madison County, Tennessee or permitting nude dancing where alcoholic beverages are sold in violation of §8-301 of the Ordinances of the City of Jackson, Tennessee. Further, Respondents are permanently enjoined from operating a business at this location because of Respondents[']continued flagrant violation of the law and because of the continuous quarreling, drunkenness, and breaches of the peace occurring, directly or indirectly by themselves, their agents or representatives.

Thus, under the trial court's order, the Defendants are enjoined from operating any business on the premises. The trial court's order was premised on its finding that, during the period in question, there were 158 incident reports in which the police made calls at or near the club, resulting in 102 arrests. The trial court characterized the Defendants' conduct as showing "a flagrant disregard of the law and an unwillingness to accept the duty imposed upon them." The testimony was undisputed that conduct in violation of the law occurred regularly with full knowledge of the Defendants.

The Defendants rightly note that the nuisance statute authorized the trial court to enjoin the Defendants only from engaging in or maintaining a nuisance, directly or indirectly, and to enjoin the owner of the building from permitting a nuisance to be maintained in the building. ***See*** Tenn. Code Ann. § 29-3-110. They argue from this that, even if the Oasis club is deemed a nuisance, the Defendants may be enjoined only from the illegal conduct, i.e. fighting and the illegal sale of alcohol. They argue that the Defendants should be permitted to operate a nude dancing club at the location.

Under the statute, the trial court is indeed limited to an injunction that abates the nuisance. ***See*** Tenn. Code Ann. § 29-3-110. However, the converse is true as well; the trial court must have the authority to issue an injunction that effectively abates the nuisance. Here, the vast majority of the incidents which form the basis for the finding that the club was a nuisance involve conduct that was illegal. Over a four-year period, the conduct was repeated over and over, despite frequent arrests and calls to the police. To hold that the statute limits the trial court to enjoining conduct which is already illegal would make the nuisance statute toothless indeed.

However, the nuisance statute does not authorize the trial court to enjoin the Defendants from utilizing the premises for a purpose unrelated to the activities which created the nuisance. We find that the permanent injunction issued by the trial court must be modified to permit the Defendants to utilize the premises for a lawful business unrelated to the business of the Oasis club. In other words, the Defendants are enjoined from utilizing the premises for a business involving nude dancing, sexually explicit conduct, or the sale of alcohol. The Defendants are free, of course, to operate a business involving these activities at some location other than the premises of the Oasis club.

Lastly, Defendants contend that the trial court erred in allowing the seizure and forfeiture of all fixtures located on their property. The nuisance statute allows for the immediate seizure of "all furnishings, fixtures, equipment, moneys and stock, used in or in connection with the maintaining or conducting of a nuisance," and provides for their forfeiture and public sale. ***See*** Tenn. Code Ann. §§ 29-3-101(c) and 29-3-110. We think the trial court's order forfeiting all fixtures and property located on the premises was clearly lawful and authorized under the statute.

In sum, we hold that the definition of nuisance under Tennessee Code Annotated § 29-3-101(a)(2) is not unconstitutionally vague or indefinite as it relates to "any place in or upon which . . . unlawful sale of any regulated legend drug, narcotic or other controlled substance, . . . quarreling, drunkenness, fighting, or breaches of the peace are carried on or permitted. . . ." On this basis, we find that the preponderance of the evidence supports the trial court's finding that the Oasis club constituted a public nuisance. This pretermits issues raised by the Defendants regarding the trial court's holding that the club was a public nuisance because the club engaged in the "unlawful sale of intoxicating liquors" by allowing nude dancing and sexually explicit conduct at a place in which

alcohol was served in violation of the Jackson city ordinance. We hold that the trial court's permanent injunction barring the Defendants from operating any business on the premises was too broad, and modify the permanent injunction to prohibit the Defendants from operating a business on the premises of the type that constituted a public nuisance, i.e. a business which involves nude dancing, sexually explicit conduct, or the sale of alcohol. Finally, we hold that the trial court's order for the forfeiture and public sale of all of the personal property and fixtures seized on the premises was lawful under the nuisance statute.

The decision of the trial court is affirmed in part, reversed in part and modified as set forth above. Costs on appeal are assessed against appellants D & L Co., Inc., Billy Diamond, Scott Luckman, James Jansen, John McKnight, Planet Rock, Inc., and SBR Enterprises, Inc., and their sureties, for which execution may issue if necessary.

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HOLLY KIRBY LILLARD, JUDGE